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File No. C. Draft Constitution/49

Legal Department
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Subject:—

Opinions given under the
Draft Constitution of India

P-8/E

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C O N T E N T S.

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Office of the R.L.A.

Reading the Press Note dated the 4th February 194. with Government Circular No.7619, dated the 27th September 1948, it appears thatit is the intention of Government to exclude the following categories of educational institutions from the Government grant:-

(1) Those in which the management, the teachers and pupils, all belong to one community; and

(2) Those in which the management and all the teachers belong to one community but admission is thrown open to students of all communities.

Difficulty, it appears, isbeing felt regarding the exact connotation of the term "community", especially in respe t of these personsprofessing Hinduism, and Government proposes to make it clear that in the case of Hindus, the term "the same community" should mean the same caste". In short, therefore, itis the intention of Government to exclude all those institutions which are not only managed but also staffed by persons belonging to one caste in case of Hindus and by persons of one religion, if professing any religion other than Hinduism, irrespective of the fact whether the institution is open to all or et.

2. It has been represented to Government, and particularly by the Parsi Federal Council, that these orders of Government conflict with the provisionsembodied in Article 23 of the Draft Constitution of India and are, therefore, unconstitutional. The Draft Constitution isnot yet law but Government desires that the orders of Government should be consistent with the decisions of the Constituent Assembly and in the circumstances the R.L.A. is requested to advise in the matter.

3-

3. Article 23 of the Draft Constitution on which reliance has been placed provides as follows:-

"23. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizens shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

This is new Article 23A.

(3) (a) All minorities whether based on religion, or language shall have the right to establish and administer educational institutions of their choice.

(b) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a inority, whether based on religion, or language."

This section has been specifically enacted to enable the minorities to preserve their culture and language. The term minority is not specifically defined either in this section or in any other section of the Constitution. Section 23, however, does not use term "minority" in the conventional sense. As explained by Dr. Ambedkar in the Constituent Assembly on 8th December 1948, the term "minority" is used here in a wider sense so as to includ cultural minorities which might exist in particular localities. A few Madrasis going to Bombay or a few Maharashtrians going to Bengal and settling down there would be a cultural minority and under clause (1) of Article 23 they would be entitled to conserv culture if they so desire.

4. Government's orders regarding communal institutions may now be examined with a view to find out whether they offend agai any of the provisions of Article 23. The orders obviously do n offend against clause (1) as they do not prohibit minorities fr conserving their language, script or culture.

Clause (2) cannot also be availed of by communal institution seeking to close their doors to outsiders. That clause specifically enacts that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid of State funds on grounds only of religion, race, caste, language or any of these. In order to receive State aid thereof, the institution must be open to all communities and Government would be justified in denying State aid to institutions which are not open to all communities. Institutions contemplated in category (i) in paragraph 3 of Government Circular No.7619 dated the 27th September 1948 can, therefore, be safely debarred from grant and Government's action cannot be challenged as unconstitutional.

5. The question would then remain only about the institutions falling in category (ii), i.e., those institutions which are not only managed but also staffed by members of one community but where the admission is thrown open to members of all communities. Government proposes to exclude these institutions from the grant and the question that arises iswhether this would be discrimination which is forbidden by sub-clause (b) of clause (3) of Article 23.

6. Article 9 of the Constitution, which deals with the fundamental right of equality, lays down that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex or any of them, and Article 10 provides that there shall be equality of opportunity for all citizens in matters of employment under the State. It is, therefore, obvious that the State itself could never have insisted that any institution under its management should be staffed by members of only

one particular community. A provision of this kind not only discriminates against members of other communities, but militates against the equality of opportunity which it is the intention of the Constitution to promote. What the state cannot itself directly do, the State cannot be permitted to do indirectly through others. Helping with grant-in-aid an institution which discriminates against citizens on the ground of their religion, caste, etc., and which denies them the equality of opportunity in matters of employment, would amount to helping the breach of the fundamental right of equality as contained in Articles 9 and 10 of the Constitution. It is upon that ground that Government would be justified in refusing grants-in-aid to educational institutions which decline to employ persons of other religions or communities. It should be made clear that the refusal is based not on the ground that the institutions are managed by the members of any particular religion or caste or community, but on the ground that they discriminate against other religions, communities, etc. in the matter of employment.

7. It follows that Government would not be justified in withholding a grant-in-aid from an educational institution which otherwise fulfils the conditions required by the Department only on the ground that it is managed by the members of one community, although it is thrown open to students of all communities and employment on its staff is given to members of all communities.

8. A copy of H.P. 's minute on this opinion is appended.

U.R. to E.& I.D. No. 129/Conf. dated the 24th February 1949.

Clause 5 of the Draft constitution as now passed at the consideration stage reads as follows:

"5. At the date of commencement of this Constitution, every person who has his domicile in the territory of India and--

(a) x x x; or

(b) x x x; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding the date of such commencement,

shall be a citizen of India, provided that he has not voluntarily acquired the citizenship of any foreign State."

A Goan must, therefore, prove three things before he is entitled to claim citizenship, viz.,

(i) that he has his domicile in the territory of India;

(ii) that he has been ordinarily resident in such territory for not less than five years; and

(iii) that he has not voluntarily acquired the citizenship of any foreign State.

For practical purposes the last may be ignored as generally it is not likely that a Goan may have also acquired the citizenship of any foreign State. The first two conditions are disjunctive, i.e., mere residence for five years will not suffice but, in addition to residence, domicile must also be established. It is possible for a man to be resident in India for five years and still retain his Portuguese domicile. In the original draft of clause 5, an Explanation was added defining what was deemed to be domicile for the purposes of the clause. In the draft as now passed that Explanation seems to have been deleted so that there is no statutory definition of domicile or procedure for proving it. The official debates are not available and we will not know what was the reason for omitting the Explanation regarding the domicile and what

connection....

provision the Constituent Assembly wanted to make for proof of domicile. Attention is invited in this connection to R.L.A.'s opinion No.4623 dated the 6th May 1947, where the principles regarding domicile were restated. Although that opinion was given in reference to the determination of domicile of candidates for Government service, the general principles remain the same. It will, therefore, be the duty of the person who is in charge of the preparation of the electoral rolls to decide in each case whether the applicant has also established his domicile in addition to five years' residence. The P.&S.D. noting confines attention merely to the condition of five years' residence. Such residence is not enough. In addition to residence a Goan must establish his domicile also. The question of domicile cannot be disposed of by a mere declaration by the applicant but must be independently established.

Remembrancer of Legal Affairs.

URR. to P.& S.D. No. 10249 dated the 10th September 1949.

Legal Department
21067/ 21.12.49.

Submitted with reference to the P & SD note at P 82 ante.

2. Item 3 under para 2 of the form of applicatio for registration as a citizen of India under Article 6 of the Constitution requires the names and ages of minor children to be specified (P 67 ante). The Collector of Ahmedabad wants clarification (P79) as to whether the age of 18 or 21 should be treated as majority age.

3. The Constitution does not prescibe any minority age limit for the purposes of acquiring citizenship. Unless it is otherwise specifically mentioned by the law concerned, every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before under section 3 of the Indian Majority Act, 1875. (IX of 1875). In the present case, therefore, the age of majority will have to be taken to be 18 years. The view taken in the P & SD note at P82 ante (in this behalf) is correct.

A to be Thereafter
PML
29/12

Now to P+SD vide 15222, dtd 29-12-1949